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IN THE

Supreme Court of the United States

October Term, 1966

No. 343

PRIMA PAINT CORPORATION,

Petitioner,

v.

FLOOD & CONKLIN MFG. CO.,

Respondent.

REPLY BRIEF FOR PETITIONER

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PRIMA PAINT CORPORATION,

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against

FLOOD & CONKLIN MFG. CO.,

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REPLY BRIEF FOR PETITIONER

The opinions below, jurisdiction, questions presented, statutes involved, and statement of the case are set forth in the petition for a writ of certiorari.

Argument in Reply

1. Respondent, by its silence, has conceded the fundamental, grave and far reaching effect of the Constitutional questions sought to be reviewed, and has further conceded:

(A) That the Second Circuit Court of Appeals has reaffirmed its position on an important question of Federal law which has not been, but should be settled by this Court;

(B) That the Court of Appeals has wholly disregarded the Constitutional caveat set forth in *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199 (1956).

(C) That with respect to the question sought to be reviewed, the decisions amongst the various Circuits are in admitted conflict.

2. Respondent admits that the question sought to be reviewed is identical with that raised in the *Robert Lawrence case,* 271 F. 2d 402 (2 Cir. 1959), cert. granted 362 U. S. 909 (1960), dismissed pursuant to Rule 60, 364 U. S. 801 (1960), and further admits that New York law would have required a contrary result citing *Wrap-Vertiser Corp. (Plotnick),* 3 N. Y. 2d 17, 163 N. Y. S. 2d 639, 143 N. E. 2d 366 (1957) (Resp. Brief pg. 4). It then seeks to dispel the aggrieved and erroneous application of Federal law complained of, by seizing upon the *dicta* of Judge Medina in the *Kinoshita case,* 287 F. 2d 951 (2 Cir. 1961), and then astutely and matter of factly concluding, that subsequent *inferior* State court decisions in the ensuing years have changed the precedent established by the *highest* Court of the State of New York.

The *Kinoshita* case, *supra,* recognized that axiomatic principles of contract law must be applied "to ascertain whether there is any factual obstacle in considering the arbitration clause." Rescission of contract for fraud in the inducement, is a factual obstacle as such, since it in effect pleads that there was no meeting of the minds, *ergo,* no contract.

3. The *Wrap-Vertiser Corp. (Plotnick)* case, *supra,* is the enunciated law of the State of New York, and all of respondent's claims and later citations contained in its brief as to the present applicable New York law, are easily distinguishable, both in fact and in law, bearing in mind that petitioner solely seeks equitable rescission of contract for fraud in the making and execution thereof.

In *Amerotron Corp.* v. *Maxwell Shapiro Woolen Co.,* 3 A. D. 2d 899, 162 N. Y. S. 2d 214 (1st Dept. 1957) affirmed without opinion, 4 N. Y. 2d 772, 171 N. Y. S. 2d 111, 148 N. E. 2d 319 (1958), the party in interest did not seek to rescind the contract, he merely sought damages for fraud, which in effect was an *action on the contract,* thereby resulting in a contrary result.

In *Fabrex Corp.* v. *Winard Sales Co.,* 23 Misc. 2d 26, 200 N. Y. S. 2d 278 (Sup. Ct. N. Y. Co. 1960), the action was entitled as a claim for fraudulent inducement, but the Court, as matter of law, found that the sole question was one of *performance of contract* and not an action for rescission for fraud in the inducement.

In *M. W. Kellogg Co.* v. *Monsanto Chemical Co.,* 9 A. D. 2d 744, 192 N. Y. S. 2d 869 (1st Dept. 1959), the Court found that this was an action involving fraudulent misrepresentations in the contract, and not one for rescission for fraudulent inducement.

In *Application of Amphenol Corporation,* 49 Misc. 2d 46, 266 N. Y. S. 2d 768 (Sup. Ct., N. Y. Co. 1965) affirmed without opinion 25 A. D. 2d 497, 267 N. Y. S. 2d 477 (1st Dept. 1966), we have the inverse situation of the party seeking rescission, attempting to enforce arbitration.

Respondent urges this Court, and would have it believe, that the Courts below in the instant proceeding, have acknowledged that the law of New York is consistent with the result reached (Resp. Brief, pp. 5-6). Nothing can be further from the truth. In the memorandum of the District Judge, not one New York case is cited, nor is New York precedent alluded to, and the same is true as to the opinion of the Circuit Court, except that one inferior New York Court case, *Fabrex Corp.* v. *Winard Sales Co., supra,* is noted.

The facetiousness of the respondent's position is amply demonstrated by his responding brief which is fraught with New York law and case citations, and thus, would seek to have this Court deny this petition upon issues outside the record, and which were not considered by the Courts below in arriving at their conclusions.

4. The issue of applicable New York law has been neither decisive nor necessary in the conclusions reached by the Courts below. The Courts below consistently applied Federal substantive law (if there be such), and it is this application of law and its constitutionality which is sought to be reviewed herein.

5. The essence of respondent's argument, that even if the Federal Courts erred in applying Federal law as opposed to State law, the petitioner has not been prejudiced thereby, is sham. It thereby admits that petitioner has not been given its day in Court. No decision has been rendered on the merits as to petitioner's and respondent's diverse contentions as regards the New York Law. The

Federal Court cannot wholly disregard the precedent established by the highest Court of the State, and each of the cases cited by respondent as manifesting a change of New York law, are easily distinguishable. This issue was never decided since the Courts below consistently and erroneously applied Federal substantive law, if there be such.

Thus, the issues raised by *Robert Lawrence, supra,* and by the instant petition are real, meritorious and require review.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari be granted.

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